

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Alex Nguyen,

Complainant,

v.

Cellco Partnership d/b/a Verizon Wireless,

Defendants.

Proceeding Number 16-242
Bureau ID Number EB-16-MD-003

VERIZON'S LEGAL ANALYSIS

Pursuant to 47 C.F.R. § 1.724(c) and the Enforcement Bureau's notice of formal complaint dated August 4, 2016 (the "Notice"), Defendant Cellco Partnership d/b/a Verizon Wireless ("Verizon") submits this Legal Analysis in connection with its Answer to the Formal Complaint ("Complaint") filed by Alex Nguyen ("Complainant" or "Mr. Nguyen").

RESPONSE TO LEGAL CLAIMS

The Commission should dismiss or deny the Complaint on procedural grounds. *First*, the Complaint does not satisfy the pleading requirements for a formal complaint under 47 U.S.C. § 208 because Mr. Nguyen cannot support his factual allegations with firsthand knowledge or some other verifiable source. *Second*, most of the relief he seeks in his Complaint is improper, as it would require the Commission to first engage in notice-and-comment rulemaking under the Administrative Procedure Act ("APA"). *Third*, to the extent that any of Mr. Nguyen's claims accrued prior to August 4, 2014, such claims (and any damages or discovery related to those

claims) are barred by the applicable statute of limitations.¹ *Fourth*, even if the Complaint was properly before the Commission, Mr. Nguyen has not satisfied his burden of proof. The vast majority of Mr. Nguyen’s “evidence” consists of citations to unsupported Internet blogs and other articles. That is not sufficient and, as the Complainant, Mr. Nguyen “has the burden of proof in establishing a violation of the Act in a formal complaint pursuant to Section 208 of the Act.” Memorandum Opinion and Order, *America’s Choice Communications, Inc. v. LCI Int’l Telecom Corp.*, 11 FCC Rcd 22494, ¶ 8 (Com. Car. Bur. 1996).

On the merits, Verizon’s practices are entirely consistent with the Commission’s existing regulations, as well as 47 U.S.C. §§ 201(b) and 202(a). Much of what Mr. Nguyen complains about are delays in devices being available for use on the Verizon network because Verizon and the device manufacturer had not yet completed the certification process to ensure those devices could connect properly with and would not harm either Verizon’s network or other users or devices. But Verizon (like other providers) is free to engage in “reasonable network management,” 47 C.F.R. §§ 8.5, 8.11, to “ensur[e] network security and integrity,” Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶ 220 (2015) (“*Open Internet Order*”), and to “restrict . . . devices and applications . . . on [its] C Block network . . . [if] such use would not be compliant with published technical standards or reasonably necessary for the management or protection of [its] network,” 47 C.F.R. § 27.16(b).

The other practices mentioned in the Complaint – ranging from selling devices with certain applications preloaded to offering promotional pricing – likewise do not violate any

¹ “All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.” 47 U.S.C. § 415(b).

Commission rules. Indeed, some practices identified in the Complaint – such as those pertaining to FM radio capability – are not even within the scope of the cited C Block and Open Internet Rules at all.

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS NOT BASED ON PERSONAL KNOWLEDGE AND THE FCC CANNOT AMEND RULES IN A COMPLAINT PROCEEDING

First, the Complaint does not satisfy the pleading requirements for a formal complaint under Section 208 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 208. The Commission’s formal complaint rules require that a complainant support his factual allegations with firsthand knowledge or some other verifiable source. The rules expressly prohibit pleading based on information and belief, except where the alleged facts could not be reasonably ascertained from any other source. *See* 47 C.F.R. § 1.721(a)(5). But here, with the possible exception of allegations regarding a Nexus 6 device he owned, Mr. Nguyen does not make *any* allegations based on firsthand knowledge or other verifiable grounds.

Though Mr. Nguyen does not use those specific words, virtually every allegation contained in the Complaint is based on information and belief, often supported only by citations to excerpts from a collection of third-party websites and blogs. Mr. Nguyen, for example, repeatedly relies on anonymous postings on Reddit, the news aggregation site and forum.² A complainant’s search of the Internet is not a sufficient basis to state a claim under the Commission’s formal complaint rules, as this case exemplifies. Not only are the cited third-party websites hearsay, but they often are written by (frequently anonymous) persons who lack firsthand knowledge of the relevant facts, misstate facts, or do not even attempt to report facts at

² *See, e.g.*, Compl. ¶¶ 67, 77, 78, 99, 102, 182 (relying on comments from an anonymous poster on Reddit).

all.³ Many of the referenced websites openly admit they are speculating or expressing opinion. It is nearly impossible to conduct – let alone for the carrier to defend against – a formal complaint proceeding based on such trial-by-website. The Complaint should be dismissed for this basic pleading inadequacy.

In its earlier Notice in this proceeding, the Commission did provide Mr. Nguyen a narrow waiver of the requirement in § 1.721(a)(5) to “provide an affidavit explaining the basis for any allegation made on information and belief.” Notice, Attach. A at 2. But the Commission expressly required Mr. Nguyen to comply with the remaining portions of § 1.721(a)(5), including his duty to support all material facts with relevant affidavits and documentation. *See id.* The waiver did *not* relieve him of the burden of proof; it merely let him plead “information and belief” as to *non*-material facts (such as, for example, the fact that Verizon is a common carrier located in New Jersey). The complaint procedures do not allow findings of fact to be based on citations to unsubstantial blog evidence, and it would be a violation of the Due Process Clause and the APA for the Commission to proceed otherwise. *See, e.g., Interstate Commerce Comm’n v. Louisville & N.R. Co.*, 227 U.S. 88, 91 (1913) (“A finding without evidence is arbitrary and baseless.”); *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007) (“[T]he agency’s decision still must be supported by substantial evidence – otherwise it would be arbitrary and capricious.”); *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 49 (D.C. Cir. 1978) (“[W]e must be satisfied that the agency has given reasoned consideration to all the material facts and issues . . . [and] that its findings of fact are supported by substantial evidence.”).

Second, nearly all of the relief Mr. Nguyen seeks in this proceeding cannot be accomplished by a formal complaint under Section 208, because it would require the

³ *See, e.g., id.* ¶ 33 (relying on speculative news articles); *id.* ¶ 70 (relying on Internet forum); *id.* ¶ 107 (relying on Internet site).

Commission to engage in notice-and-comment rulemaking under the APA. At bottom, Mr. Nguyen is asking that the Commission rewrite the regulations on which he relies – the C Block and Open Internet Rules – to preclude carriers from managing their own networks or from denying a device, software, or application access to those networks by applying reasonable network management.

The APA “mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.” *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015). The APA “makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Thus, “it is hornbook administrative law that an agency need not – indeed, *should not* – entertain a challenge to a regulation, adopted pursuant to notice and comment, in an adjudication or licensing proceeding.” *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (emphasis added).

Applied here, those principles prohibit the Commission from altering its rules, which were issued through the notice-and-comment process and which expressly permit the reasonable network management Mr. Nguyen would dispense with, in this adjudication proceeding. Mr. Nguyen’s requested relief effectively would repeal legislative rules adopted pursuant to notice-and-comment rulemaking. The Commission may not, consistent with the APA, either:

- (a) repeal its rules without again proceeding through the informal rulemaking process; or
- (b) conclude that its rules should not apply under these circumstances. Either action would necessarily work an effective repeal of a legislative rule, an action the agency cannot take without first giving the public notice and an opportunity to comment. *See Utility Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001).

II. VERIZON DID NOT INTERFERE WITH CUSTOMERS' ABILITY TO USE THE DEVICES OF THEIR CHOICE (COUNT ONE)

Mr. Nguyen alleges (¶ 133) that Verizon interfered with customers' ability to use the devices of their choice by impermissibly blocking or delaying third-party devices from accessing its network in violation of 47 C.F.R. § 27.16, 47 U.S.C. § 202(a), and 47 C.F.R. §§ 8.5 and 8.11. He is wrong.

A. Verizon Is Well Within Its Rights Under the Commission's Rules To Require That Devices Pass Its Certification Process Before Providing Access to the Verizon Network

Both the C Block Rules and the Open Internet Rules recognize a provider's rights to: (1) not allow or withhold the activation of devices until they have been certified for safe use on its network, and (2) limit provision of subscriber identity modules ("SIM" cards) to authorized and certified devices.⁴ The Rules specifically state that a provider may engage in "reasonable network management," 47 C.F.R. §§ 8.5, 8.11, to "ensur[e] network security and integrity," *Open Internet Order* ¶ 220. Further, the Rules state that a provider should not offer access to its networks until such devices "compl[y] with published technical standards reasonably necessary for the management or protection of the [provider's] network." 47 C.F.R. § 27.16(b)(1). That is what Verizon has done.

The Rules do not require Verizon to open its network to unauthorized, third-party devices without screening to ensure those devices conform to Verizon's published technical and safety specifications. In fact, the opposite is true: the network management exception to the Rules

⁴ Unlike the referenced Commission requirements that cable companies have set top boxes that work with CableCARDS, there is no similar Commission regulation of SIMs and how they work with mobile devices. Answer ¶ 38. To the contrary, the Commission's rules permit the use of carrier-specific SIMs, as Verizon is permitted to set reasonable technical requirements for accessing its network, which would include requirements for SIM cards that enable attachment of devices to the network in a secure way. *Id.*

permits Verizon to insist that third-party devices be certified for safe use *before* providing those devices with access to its network.

Verizon’s certification process is precisely the type of “reasonable network management” the Commission envisioned when it created the C Block and Open Internet Rules. It would be irresponsible (not to mention dangerous) for Verizon to permit third-party devices on its network without being reasonably certain that doing so will not endanger its network infrastructure, will not interfere with the proper functioning of the network, and will not harm or interfere with the customer experience or the functioning of other devices on the network. The Commission recognizes as much, noting “that the additional challenges involved in mobile broadband network management mean that mobile broadband providers may have a greater need to apply network management practices, including mobile-specific network management practices, and to do so more often The ability to address these [mobile-specific] dynamic conditions in mobile network management is especially important given capacity constraints many mobile broadband providers face.” *Open Internet Order* ¶ 223.

Moreover, in direct contrast to what Mr. Nguyen seeks, the Commission “emphasize[s] that [it is] not requiring wireless service providers to allow the unrestricted use of *any* devices or applications on their networks. . . . Wireless service providers may continue to use their own certification standards and processes to approve use of devices and applications on their networks so long as those standards are confined to reasonable network management.”⁵

⁵ Second Report and Order, *Service Rules for the 698-746, 747-762 & 777-792 MHz Bands; Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Sys.; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 To Streamline and Harmonize Various Rules Affecting Wireless Radio Servs.; Former Nextel Communications Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules*, 22 FCC Rcd 15289, ¶ 223 (2007) (“*Service Rules Order*”).

Verizon does not violate any rules by requiring certification of devices before those devices can access the Verizon network. Rather, the certification process is necessary because not all devices are the same, and not all devices are made or sold in a form that is compliant with the technical standards that Verizon requires in order to connect to its network. Answer at 3-4. Indeed, even devices that have the same model name can have different hardware or software when they are made for use on another carrier's network, which can result in different functionality or connectivity issues with the Verizon network.⁶ *Id.* Accordingly, Verizon must evaluate each device to ensure it is safe for use on its network. *Id.* And, for the same reasons, Verizon is also well within its rights to refuse to provide and/or activate SIM cards for use with devices that have not been confirmed as safe and function on its network; with the SIM card, those devices could use the Verizon network, directly undermining the certification process and the legitimate purposes for it. *See id.* ¶ 56. Indeed, the Commission has recognized a provider's duty to ensure that only safe, certified devices connect to its network, stating that providers should "optimize overall network performance and maintain a consistent quality experience for consumers while carrying a variety of traffic over [its] network[]." *Open Internet Order* ¶ 215.

Notwithstanding Mr. Nguyen's general allegations about alleged examples of delays, Verizon's certification process is quick and narrowly tailored to achieve these legitimate goals. While there may be occasional instances in which a device takes longer to certify than the typical device, those instances are often due to circumstances within the control of the manufacturer or party submitting the device for certification. *See Answer* ¶ 36. For instance, occasionally there

⁶ Further, each mobile provider builds its network differently, has different certification processes, and has different hardware and software requirements for its devices. The fact that, for example, a device built for use on the T-Mobile network may be commercially available before a similar device built for the Verizon network is irrelevant to any Open Internet or C Block Rule.

are devices submitted for certification that may not initially (and sometimes may never) be compliant with the technical standards that Verizon requires in order to connect to its network. *See id.* But, in all instances, Verizon works reasonably and cooperatively with the party submitting such a device to try to resolve any issues and certify the device as quickly as possible. *See id.*

Indeed, it is in Verizon's interest to do so. The more devices that are available to customers, the more opportunities there are for Verizon to win new customers, meet consumer demand, and increase consumer satisfaction. *See Answer* ¶ 31. In any event, Mr. Nguyen has provided no evidence that Verizon impermissibly rejected a device that was otherwise eligible for use on its network or that it intentionally delayed or prolonged the certification process for any device. Rather, Mr. Nguyen cherry-picks blog statements or allegations about one-off instances in which Verizon allegedly delayed certification of a device, without any support or context for why such delay occurred.

In sum, Mr. Nguyen's Complaint is based on a fundamental misunderstanding of Verizon's device certification process and standard mobile industry practices. The certification process is not, as Mr. Nguyen alleges, a means for Verizon to maintain a competitive advantage in the market for retail device sales. To the contrary, it is in Verizon's interest for many devices to be available for use on its network. *See Answer* at 3. The certification process is a necessary safeguard that cellular network providers across the country⁷ employ to ensure that devices do

⁷ Verizon, AT&T, and Sprint all require third-party devices to pass certification testing before use on their wireless networks. *See* <https://opennetwork.verizonwireless.com/content/open-development/get-certified.html> ("Once [a device] passes the compliance testing, the device can be connected to [Verizon's] network."); <https://developer.att.com/developer/forward.jsp?passedItemId=4500008> ("[T]o ensure that these devices optimize their network use in the safest possible way . . . , AT&T Network Ready certification ensures that your device is tested against our network and performs to network specifications."); <https://sprint.com/legal/>

not harm their networks and, in turn, their customers. Mr. Nguyen has provided no evidence that Verizon rejected devices that should have been certified or that any failure (or delay) in certification was due to Verizon imposing unlawful or unreasonable requirements, rather than decisions (or delays) by the manufacturer. As such, he has failed to carry his burden to show a violation of any Commission rules or other legal obligations placed on Verizon.

B. Verizon Does Not Unreasonably or Unjustly Discriminate in Charges and Practices by Requiring Devices To Pass Its Certification Process Before Providing Access to the Verizon Network

Contrary to Mr. Nguyen's assertions, Verizon has not violated 47 U.S.C. § 202(a) by requiring devices to pass its certification process before providing access to the Verizon network.

As an initial matter, Verizon's internal certification process cannot be subject to 47 U.S.C. § 202(a), because it is not a telecom service provided to customers. "Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind." 47 U.S.C. § 202(b). Verizon's internal certification process is not a service provided to any customers in connection with the use of Verizon's network. It is simply Verizon's internal review process. *See Answer at 4.*

But even if Verizon's certification process *is* subject to 47 U.S.C. § 202(a), it is not unjust and unreasonable in violation of the statute. "[A] § 202(a) claim consists of three elements: (1) whether the services are 'like'; (2) if so, whether the services were provided under different terms or conditions; and (3) whether any such difference was reasonable." *National Communications Ass'n Inc. v. AT&T Corp.*, 238 F.3d 124, 127 (2d Cir. 2001). Mr. Nguyen's

[open internet information.html](#) ("Any device certified as being Sprint network compatible may be used on the Sprint network including compatible devices not purchased from Sprint.").

complaints about Verizon's certification process do not satisfy these elements. Indeed, because Verizon's certification process complies with – and is required by – the Commission's rules, it cannot be unjust and unreasonable in violation of Section 202.

As to the first element, devices that have not yet been certified for safe use and proper functioning on the Verizon network are *not* the same as approved devices, whether sold by Verizon or certified devices sold through another channel. *See* Answer ¶ 52. Such devices have not yet been tested to ensure that they meet Verizon's published technical and safety requirements. *Id.* Thus, devices obtained from other sources that have not yet been subjected to the certification process, on the one hand, and devices approved for use on Verizon's network, on the other, are *not* "like" as required by 47 U.S.C. § 202(a). And, as discussed above (*supra* p. 8) the devices themselves – even devices which bear the same model name – are not necessarily the same: such devices may have different hardware or software – resulting in different functionality and compatibility and, therefore, requiring testing and certification. *See* Answer at 3.

With respect to the second element, Verizon does *not* offer different terms for service to *certified* third-party devices as compared with devices sold by Verizon. Verizon's refusal to provide SIM cards for *uncertified* devices is a reasonable network management practice that protects the Verizon network and its customers. *See* Answer ¶ 38. It follows that Verizon's treatment of uncertified devices also is reasonable under the third element of the Section 202(a) test. While Mr. Nguyen attempts to mischaracterize Verizon's necessary, permitted certification process as illegal "blocking," he has not provided any evidence to suggest that Verizon has unreasonably or unjustly discriminated against devices that were eligible and should otherwise have been certified for use on its network.

C. Verizon Does Not Engage in Anticompetitive Behavior by Requiring Devices To Pass Its Certification Process Before Providing Access to the Verizon Network

Verizon likewise does not engage in anticompetitive behavior by requiring devices to pass its certification process before providing access to the Verizon network. Mr. Nguyen argues that any time a third-party device is made available to the public before it is approved for use on Verizon's network (e.g., when a device certification is delayed beyond the device's release to other networks because the device's manufacturer did not initially present the device to the lab with components and software that meet Verizon's network safety specifications), Verizon engages in illegal, anticompetitive blocking that violates the law. That is incorrect.

Verizon's permitted certification process is not a "[p]ractice[] that [has] anti-competitive effects in the market for applications, services, content, or devices," as contemplated by the Commission's Open Internet Rules. *Open Internet Order* ¶ 140. To the contrary, the process "leads to greater options for consumers in services, applications, content, and devices, and as such, . . . promot[es] consumers' and edge providers' ability to use broadband Internet access service to reach one another." *Id.* The point of having a certification process is to ensure that a variety of new and existing third-party devices can safely access the Verizon network (and, thus, provide a greater set of options to Verizon customers). *See Answer* at 3-4. It cannot be the case that Verizon simultaneously promotes competition through its review process (by encouraging new devices to connect to its network) and engages in anticompetitive behavior every time a device (in the midst of the review process) is released to other networks before it is certified for safe use on the Verizon network.

Mr. Nguyen faults Verizon simply for having a large number of customers; and he asserts that, because of its large footprint, Verizon automatically engages in anticompetitive behavior

when it advertises, runs a video service, or creates its own proprietary applications. But the size of Verizon's customer base cannot form the basis for a rule violation, and nothing in the Rules prohibit providers – no matter how large – from having proprietary products and offerings. Moreover, Mr. Nguyen points to the fact that Verizon released its own line of devices the same year as similar devices sold for use on other carriers' networks. But there is nothing nefarious in that timing or in competition that results in more device options being made available to consumers. Mr. Nguyen has provided no evidence to show that Verizon received any improper or unlawful benefit from the release of its own devices on its network before the release of other similar, certified third-party devices.

D. Verizon Is Not Required To Provide Mr. Nguyen with Detailed Explanations for Why Devices May Take Longer Than Anticipated To Certify, Why a Device Did Not Complete the Certification Process, or Why It Refuses To Provide SIM Cards for Uncertified Devices

Verizon is not required to provide to Mr. Nguyen (or the public at large) a detailed, technical explanation for why a device may have taken some time to certify, why a device did not complete the certification process, or why Verizon does not provide SIM cards for uncertified devices. In arguing to the contrary, Mr. Nguyen erroneously relies on the C Block Rules. The Rules require only that Verizon “establish and publish clear and reasonable procedures for parties to seek approval to use devices or applications on [its] network,” which it clearly has,⁸ and to “provide a written response” to parties that have requested access to its

⁸ Like other major wireless carriers in the United States, Verizon maintains a comprehensive device certification process, which is explained in depth on its “Open Network” website. *See* Exhibit 11 (<https://opennetwork.verizonwireless.com/content/open-development/faq.html>). Anyone with an Internet-enabled device and an Internet connection can visit the “Frequently Asked Questions” page to learn about the program’s purpose (“to allow and encourage the development community to create new products, applications and services beyond what Verizon Wireless offers in its portfolio and bring these to the marketplace on the Verizon Wireless network”), who is responsible for the approval testing (“Verizon Wireless has certified

network and have been denied. 47 C.F.R. § 27.16. Notably, the Rules do *not* require Verizon to provide members of the general public with information regarding proprietary network security information because that disclosure could cause harm to its network and/or impose a competitive disadvantage on Verizon. And while Verizon’s technical standards are publicly available, Verizon must be careful not to disclose any proprietary or confidential information about a particular device that it discovers in the certification process. Answer ¶¶ 151, 152, 231. That practice also would breach confidentiality agreements with device manufacturers. *Id.* As explained in further detail below, Mr. Nguyen has provided no evidence of his (or anyone else’s, for that matter) attempts to seek approval to use devices or applications on its network, subsequent denials, and subsequent inadequate explanations on Verizon’s part.

III. VERIZON DOES NOT IMPOSE DISCRIMINATORY PRICING ON BRINGING YOUR OWN DEVICE (COUNT TWO)

Mr. Nguyen alleges (¶ 157) that Verizon “imposed discriminatory effective ‘activation fees’” and “continues to impose discriminatory effective line access charges” on customers for bringing their own third-party device to the network in violation of 47 C.F.R. § 27.16, 47 U.S.C. § 202(a), and 47 C.F.R. §§ 8.5 and 8.11. Again, Mr. Nguyen is incorrect.

A. Verizon Does Not Discriminate Against Customers Who Bring Their Own Device

Verizon has not “unreasonably discriminated against bringing your own device,” Compl. ¶ 166, in violation 47 U.S.C. § 202(a). As discussed in further detail above (*supra* p. 11), the unauthorized use of Verizon’s network via an uncertified device does not constitute a service “like” the authorized use of Verizon’s network via a certified device. Moreover, as explained in

a number of external test labs to conduct Open Development Device approval testing”), and the typical amount of time it takes to approve a device (“we expect the typical lab time to be weeks rather than months”). *Id.*

more detail in its Answer to the specific allegations in the Complaint, Verizon did not offer different terms or conditions for service provided to customers who purchased their device from Verizon and service provided to customers who brought their own devices to the network. *See* Answer ¶¶ 59-69, 156-174. Verizon provided the same effective monthly service pricing to customers who brought their own smartphones as it did to customers who purchased such devices from Verizon either with a full, upfront payment or with financing to spread the cost over 24 months. *See id.* And Verizon charged the same effective “activation fee” for customers who brought their own devices as it did to customers who purchased a smartphone from Verizon (whether in full upfront or at a discount with a two-year service agreement). *See id.*

Nor has Verizon “impose[d] any additional discriminatory charges (one-time or recurring) or conditions on customers who seek to use devices or applications outside of those provided by the licensee,” *Service Rules Order* ¶ 222, in violation of the C Block Rules. Again, Verizon has not imposed any discriminatory charges against customers who brought their own *certified* device to the network. *See* Answer ¶¶ 65, 168-169. And Verizon does not discriminate against customers who bring *uncertified* devices to its network; the Commission has explicitly “emphasize[d] that [it does] not requir[e] wireless service providers to allow the unrestricted use of *any* devices or applications on their networks.” *Service Rules Order* ¶ 223.

- 1) *Verizon does not charge discriminatory line access fees to customers who bring their own devices to its network.*

Between April 2014 and March 2016, Verizon provided a promotional discount resulting in an effective monthly access charge of \$15 per month for customers at certain data levels. *See* Answer ¶ 159. All such customers received this \$15 per-month line access charge, including customers who brought their own smartphone devices on month-to-month contracts and customers who purchased and financed a smartphone through Verizon. *See id.* ¶¶ 63, 159.

However, Verizon could not provide the discount to month-to-month customers who attempted to bring devices that were *not certified for use* (or could not be identified as certified for use) on the Verizon network. *See id.* ¶¶ 65, 168-169. For example, Verizon did not receive the necessary device identifier – the International Mobile Equipment Identity (“IMEI”) number – for certain iPhones to confirm that they were certified and safe for use on the Verizon network. *See id.* ¶ 50. Because those phones could not be confirmed to be smartphones certified for use on Verizon’s network, Verizon’s systems did not recognize them as valid smartphones eligible for the discounted line access charge pricing. *See id.* ¶¶ 65, 168-169.

Moreover, Verizon’s decision in March 2016 to end *all* discounts for *all* month-to-month customers on the MORE Everything Plan did not discriminate against customers who brought their own device. *See id.* ¶¶ 67-68. All month-to-month customers – including those (a) who purchased a subsidized device from Verizon but whose contract was expired, (b) who purchased a device for its full retail price from Verizon, and (c) who brought their own devices – no longer receive the line access discount. *See id.* Thus, customers who purchased a device *from Verizon* have lost their ability to receive the discount, just the same as customers who brought their own devices. *See id.*

- 2) *Verizon does not charge discriminatory activation fees to customers who bring their own devices to the Verizon network.*

Verizon currently charges a \$20 activation fee for activating a new line of service to *all* customers, regardless of whether the customer purchases his or her device from Verizon or brings his or her own device, with the exception of customers on two-year plans who purchase a subsidized device from Verizon. *See Answer* ¶ 69. Prior to November 2015, however, Verizon waived the activation fee (in certain circumstances) for a limited time for customers that financed their device through Verizon’s payment plan. *See id.* ¶¶ 69, 158. Thus, the limited-time

discount did *not* draw a distinction between customers who brought their own device and those who purchased from Verizon. *See id.* Rather, the distinction was between customers who financed their phones with Verizon and those who did not (even if the latter customers bought a non-financed, full-price phone *from Verizon*). *See id.* Many customers who purchased a device from Verizon paid the same as customers who brought their own device. *See id.* Under these circumstances, Verizon cannot be said to have singled out or discriminated against customers who brought their own phones.

Further, the market for wireless service is highly competitive, and there is nothing in the Rules preventing Verizon from offering competitive sales incentives for customers financing a device through Verizon. In fact, the Commission has explicitly permitted such discounts. *See Memorandum Opinion and Order, Orloff v. Vodafone Airtouch Licenses, LLC*, 17 FCC Rcd 8987, ¶ 20 (2002) (holding that a carrier’s sales concessions were not unreasonably discriminatory under 47 U.S.C. § 202(a) even though they were not offered to all customers). And Mr. Nguyen has provided no evidence to suggest that the discount had any effect on any customer’s decision to purchase a device through Verizon or bring his or her own device to the network.

B. The Open Internet Rules Do Not Require Verizon To Charge the Same Line Access and Activation Rates for All Customers

Additionally, the Open Internet Rules do not prohibit Verizon from charging different activation and line access rates to customers. In fact, in adopting the Open Internet Rules, the Commission stated explicitly that it does not regulate wireless rates. *See Open Internet Order* ¶ 499 (“Consequently, providers will not be subject to *ex ante* rate regulation nor any requirement of advanced Commission approval of rates and practices . . .”). Despite Mr. Nguyen’s attempt to characterize Verizon’s conduct as illegal blocking and interference (¶¶ 163,

164), the Orders do *not* address whether Verizon must provide uniform activation and line access rates to customers.

IV. VERIZON DID NOT INTERFERE WITH EDGE PROVIDERS’ ABILITY TO MAKE THE DEVICES OF THEIR CHOICE AVAILABLE TO CUSTOMERS (COUNT THREE)

Mr. Nguyen alleges (¶ 176) that Verizon “compelled edge providers to disable FM radio capabilities” and “disabled (or compelled Apple to disable) Embedded Apple SIMs [in 9.7-inch iPad Pro devices]” in violation of 47 C.F.R. § 27.16, 47 U.S.C. § 201(b), and 47 C.F.R. §§ 8.5 and 8.11. Mr. Nguyen is again incorrect.

A. The Open Internet and C Block Rules Do Not Apply to FM Radio

As a matter of law, the C Block Rules and Open Internet Rules do not apply to FM radio capabilities. The C Block Rules are intended to ensure that providers do not “deny, limit, or restrict the ability of their customers to use the devices and applications of their choice on the [provider’s] *C Block network*,” 47 C.F.R. § 27.16(b) (emphasis added). And the Open Internet Rules “apply to both fixed and mobile *broadband Internet access services*.” *Open Internet Order* ¶ 25 (emphasis added). FM radio is neither transmitted over the C Block network (or in the identified MHz bands) nor transmitted over broadband Internet access services. Thus, even if Verizon *did* prohibit access to FM radio tuners on devices used on its network, which it *did not*, Answer ¶ 70, Verizon could not violate the C Block and Open Internet Rules. But even if the C Block and Open Internet Rules *do* apply, as explained below, Verizon has not disabled any FM radio features on the devices that it chooses to sell in violation of the Commission’s Rules.

It is not an “unjust or unreasonable” practice as contemplated by 47 U.S.C. § 201(b) for Verizon not to sell phones with FM radio capabilities, as Mr. Nguyen claims. Verizon is entitled to select the devices it chooses to sell in its stores. But, as explained in further detail in

paragraph 70 of its Answer, Verizon does not prohibit device manufacturers from incorporating tuners into their devices. The device supplier decides, in its discretion, whether or not to include the FM radio capability. Answer ¶ 70. And even if Verizon declined to market to its customers a device containing an FM tuner, nothing in the statute nor in the Commission’s rules requires that Verizon sell in its stores or on its website devices that it does not want to sell. Notably, Verizon does, in fact, sell several devices that have FM radio capabilities. *Id.* Customers are free to purchase any of those devices. *Id.*

B. Verizon Did Not Interfere with the Ability of Edge Providers To Make Available the Devices of Their Choice to Customers by Selling 9.7-Inch Apple iPad Pro Devices that Use Verizon-Specific SIMs

As a matter of law, Verizon has not: (1) engaged in any “unjust or unreasonable practice,” 47 U.S.C. § 201(b); (2) “block[ed] lawful content, applications, [or] services,” 47 C.F.R. § 8.11; (3) “unreasonably interfer[ed],” *id.* § 8.11, with edge providers’ ability to make the devices of their choice available to end users; or (4) “disable[d] features on handsets it provide[d] to customers,” *id.* § 27.16(e), by selling 9.7-inch Apple iPad Pro devices that utilize a Verizon-specific SIM. Moreover, Verizon is not “deny[ing], limit[ing], or restrict[ing] the ability of [its] customers to use the devices and applications of their choice on [its] C Block network.” *Id.* § 27.16(b).

Verizon is not the sole or even primary source of iPad sales (including the 9.7-inch iPad Pro).⁹ It is Apple – not Verizon – that decides what devices Apple will make available to its customers. When a customer buys an iPad from Verizon, that customer is doing so because he or she wants to use Verizon’s data network. Within this context, it makes sense (and certainly is not an unreasonable or deceptive practice) to sell iPads that, out of the box, are configured to

⁹ See, e.g., https://www.bhphotovideo.com/c/product/1241360-REG/apple_mlq52ll_a_9_7_ipad_pro_128gb.html.

work on Verizon's data network. *See Answer* ¶ 79. Like any other device, these iPads work on the Verizon network using a Verizon SIM. *See id.*

Customers, of course, are free to purchase 9.7-inch iPad Pro devices from a multitude of sources, including directly from Apple, that sell the device with Apple SIM technology. Verizon does not prohibit customers from connecting to its network 9.7-inch iPad Pro devices purchased from other retailers with the Apple SIM technology. *See id.* ¶¶ 79, 179. Nor does Verizon preclude customers from taking Verizon versions of this device to another carrier, where they can use a SIM specific to that carrier – just as customers would do with any other device. *See id.*

V. VERIZON DID NOT INTERFERE WITH CUSTOMERS' ABILITY TO USE THE APPLICATIONS OF THEIR CHOICE OR WITH EDGE PROVIDERS' ABILITY TO MAKE THE APPLICATIONS OF THEIR CHOICE AVAILABLE TO CUSTOMERS (COUNT FOUR)

Mr. Nguyen alleges (¶ 181) that Verizon preloaded its own applications and blocked competing applications from devices, as well as blocked device tethering functionality, in violation of the 2012 Order and Consent Decree, 47 C.F.R. §§ 8.5, 8.11, and 27.16, and 47 U.S.C. §§ 201(b) and 202(a). Once again, Mr. Nguyen is incorrect.

As an initial matter, Mr. Nguyen's reliance on the Consent Decree is misplaced. The Consent Decree expired in July 2014 and is no longer in effect. *See Consent Decree, Cellco Partnership d/b/a Verizon Wireless, 27 FCC Rcd 8934 (Enf. Bur. 2012)* ("2012 Consent Decree"). Specifically, the decree's compliance plan expired in July 2014, *see id.* ¶ 10(e), which coincided with Verizon's obligation to file its final compliance report under the decree, *see id.*

¶ 12. The Consent Decree imposed no continuing obligations on Verizon after July 2014.

A. The Commission Explicitly Recognizes Verizon's Ability To Charge Tethering Service Access Fees to Its Customers on Unlimited Data Plans

The Commission's rules do not require Verizon to provide free tethering service or to provide tethering service to all plans at an equal rate. The Commission recognized as much,

noting that Verizon may charge customers on its unlimited data plans additional fees to tether their devices. *See 2012 Consent Decree* ¶ 14 (“Verizon Wireless . . . allow[s] customers on usage-based plans to tether their devices without paying an additional fee, while customers on unlimited usage plans must continue to pay an additional fee to tether their devices.”). Verizon’s tethering service enables device owners to effectively turn their devices into mobile hotspots.¹⁰ Customers who receive Verizon’s Mobile Hotspot service can share their device’s cellular data with another device by connecting the second device to a Wi-Fi network hosted by the shared device.¹¹

As explained in more detail in its Answer to the specific allegations in the Complaint, Verizon does not disable built-in tethering features nor charge an additional \$20/month to re-enable them. Answer ¶¶ 15, 19, 82, 182, 204, 212, 214. Verizon does offer its own tethering service (“Mobile Hotspot” or “Mobile Broadband Connect”) in connection with certain (older) data plans, for which Verizon has charged a fee only to customers on its unlimited-data Nationwide or earlier plans (Verizon does not charge for that tethering service on its newer, usage-based plans). *Id.* ¶¶ 15, 19, 82, 182, 204. But there is nothing in the Commission’s Rules that prevent Verizon from charging customers for this service, just as it would for other services like voice or data.

All customers on Verizon’s MORE Everything Plan or Verizon Plan receive the service for free, while customers on its unlimited-data Nationwide or earlier plans may elect to receive the service for \$20 per month. *See id.* ¶¶ 15, 19, 82, 182, 204. Thus, Verizon has not “blocked tethering functionality” by charging some of its customers a fee to access its tethering service.

¹⁰ *See* <http://www.verizonwireless.com/support/mobile-hotspot-faqs>.

¹¹ *See id.*

Nor does Verizon block any third-party tethering applications; any customer can download any available application for his or her device, including third-party tethering applications. *See id.*

¶¶ 15-16, 19, 82, 182, 186, 204.

B. The Commission’s Rules Permit Verizon To Choose What Software To Preload on the Phone That It Sells to Customers

The Commission’s rules do not require a carrier to sell devices that have any particular applications preloaded. To the contrary, the Commission has explicitly stated that “nothing . . . obligates Verizon Wireless to take affirmative steps, such as including any particular Third Party Application in any Application Store that Verizon Wireless itself operates, to make any particular Application available to its customers on the C-Block Network or to design the devices it offers customers to work with or accommodate any particular Application.” *2012 Consent Decree* ¶ 13(c). And while “Verizon [cannot] explicitly or implicitly request that [an] Application be made unavailable to Verizon’s C Block customers,” *id.* ¶ 13(b), Mr. Nguyen has provided no evidence to suggest that Verizon has done so. There is a fundamental – and dispositive – difference between Verizon selling devices that preload certain applications and making those applications “unavailable” to customers at all (for example, via a post-device purchase download), which Verizon has not done.

As a practical matter, there are literally thousands of applications available for various devices that run on Verizon’s network. Answer ¶¶ 32, 42, 87, 91. It cannot be the case that Verizon’s failure to preload all of those applications on devices it sells in its stores is a violation of the Commission’s rules. And there is nothing in the Commission’s rules or other source of law that precludes a carrier from selling devices preloaded with the software or applications of its choice, subject to the commercial arrangements it makes with its device suppliers. Indeed, Mr. Nguyen cites no such rule or other source of law in support of this novel theory. Thus,

Verizon has not “blocked” any applications by preloading or refusing to preload any applications of its choice.

C. All of the Applications Mr. Nguyen Alleges Were Blocked Were Actually Made Available for Download

Despite not preloading the applications on devices that Verizon sells, all of the applications that Mr. Nguyen asserts were blocked were, in fact, made available for download. *See Answer* ¶¶ 34, 90, 95, 101, 105, 108, 111, 113, 117, 216, 221. Thus, Verizon has not “blocked” these applications nor made them unavailable; customers have access to them. And, as a general matter, to the extent that any applications are available and safe for use on the device and Verizon’s network, customers are free to download and use on Verizon’s network applications of their choice. *See id.* ¶¶ 42, 72, 87, 90-91, 95, 108, 111, 181, 183-184, 187.

D. Verizon Has Not Blocked Any Applications Solely Because They Were Not Available for Download on Verizon Devices the Same Day They Were Released to Other Networks

Verizon does not block applications or “‘unreasonably interfere with or unreasonably disadvantage’ end users’ ability to use the applications of their choice or edge providers’ ability to make the applications of their choice available to end users,” Compl. ¶ 191, merely because the applications were not available for download on devices connected to the Verizon network the same day they were released to the public. Nothing in the Rules requires Verizon to preload or make available for download any application by or before the same date on which they are made available for other networks.

Mr. Nguyen claims (¶ 190) that Verizon impermissibly “blocked” the “Pay with PayPal” application for ten days, the “Samsung Pay” application for twenty-three days, and the “Samsung Internet 4.0” application for seventeen days, because these applications were not preloaded onto devices nor made available for download at the precise date on which they were released to the

public. However, the fact that Mr. Nguyen asserts that all three of the applications about which he complains were made available to consumers within one to four weeks of their public release dates refutes his assertion that those applications were “outright blocked.” *See* Answer ¶¶ 90, 101, 105, 108, 111, 113, 117, 216, 221.

E. Verizon Does Not Discriminate Against Applications That Compete Against Verizon-Backed Applications

Verizon has not “unreasonably discriminate[d] against applications that compete against Verizon-backed applications,” Compl. ¶ 215, in violation of 47 U.S.C. § 202(a). Mr. Nguyen concludes, without citing any supporting evidence, that Verizon “preloads or compels customers to use Verizon-backed applications and blocks applications that compete against Verizon-backed applications.” *Id.* This is simply not true. As explained in further detail above, nothing in the statute nor the Open Internet and C Block Rules prohibits Verizon from selling devices that preload any applications of its choice.

Moreover, Verizon does not impermissibly block *any* applications, regardless of whether the application does or does not compete with a similar Verizon application. In fact, Mr. Nguyen concedes that all three of the applications that he claims were “blocked” were made available for download to device owners within a month of their public release; this is hardly the type of discrimination contemplated by 47 U.S.C. § 202(a). *See* Answer ¶¶ 90, 101, 105, 108, 111, 113, 117, 216, 221.

F. Verizon Has Not Gained Any Competitive Advantage from Choosing To Make Applications Available for Download Instead of Preloading Them on Its Devices

Mr. Nguyen’s claim that Verizon “abused its position as gatekeeper (in particular, its retail operations and its ‘certification’ process) to compel device providers to preload Verizon-backed applications and block device providers from preloading applications that compete

against Verizon-backed applications,” Compl. ¶ 197, is without merit. Verizon has not gained any competitive advantage from, for example, choosing to make Pay with PayPal, Samsung Pay, and Samsung Internet 4.0 available for download instead of preloading them on the devices that it sells. And Mr. Nguyen provides no evidence that Verizon gained any such advantage from doing so. To the contrary, Verizon has every incentive to offer many safe and compliant applications for use on its network to meet consumer demand and avoid a competitive disadvantage if other carriers permit such applications on their networks.

VI. VERIZON ACCURATELY DISCLOSED THAT CERTAIN DEVICES COULD NOT CONNECT TO ITS NETWORK IN COMPLIANCE WITH THE TRANSPARENCY RULE (COUNT FIVE)

Mr. Nguyen alleges (¶ 226) that Verizon publicly disclosed misleading information regarding the compatibility of third-party Apple iPhone 5 and iPhone 6 devices for its network in violation of 47 C.F.R. § 8.3. He is incorrect.

A. Verizon Made Timely Updates to Its Disclosures

“[T]he Transparency Rule prevents a broadband Internet access provider from making assertions about its service that contain errors, are inconsistent with the provider’s disclosure statement, or are misleading or deceptive.” Public Notice, FCC Enforcement Advisory, *Open Internet Transparency Rule: Broadband Providers Must Disclose Accurate Information To Protect Consumers*, 29 FCC Rcd 8606, 8607 (2014). But that does not mean that providers are required to immediately update public disclosures after every change that occurs in the normal course of business. In fact, the Commission has explicitly declined to follow that approach by refusing “to adopt a specific timeframe concerning the updating of disclosures following a material change.” *Open Internet Order* ¶ 161 n.392.

Historically, Apple devices (up to and including the iPhone 5, 5c, and 5s devices) made for use on other networks were not compatible with the Verizon network. *See Answer* ¶¶ 55,

122, 124. These Apple devices did not support CDMA and, therefore, could not be used on Verizon's network. *See id.* ¶ 55. This changed when Apple introduced the iPhone 6 and 6 Plus devices, *see id.* ¶ 122, but the third party versions of even those particular devices could not be used immediately on Verizon's network. *See id.* ¶¶ 49-51. Indeed, when Apple initially released the iPhone 6 and 6 Plus, Verizon did not receive the International Mobile Equipment Identified ("IMEI") number for each device, which Verizon uses to identify whether a device is the same version that has passed its device certification process. *See id.* Verizon did not have access to the IMEI numbers for iPhone 6 and 6 Plus devices that were purchased from third parties and could not identify the devices for use on its network. *See id.* Verizon worked with Apple to obtain the necessary IMEI ranges and, once Apple provided them, customers could then use a third-party iPhone 6 or 6 Plus device on the Verizon network. *See id.* Verizon did not immediately update the "Apple iPhone FAQ" page to reflect that new information regarding the iPhone 6 and 6 Plus. *See id.* ¶¶ 122-123. However, after Mr. Nguyen alerted Verizon to the fact that Verizon's "Apple iPhone FAQ" page needed to be updated, Verizon took action promptly to update its page. *See id.*

B. Verizon Accurately Stated That Third-Party iPhone 5s and Earlier-Generation iPhones Are Not Compatible with the Verizon Network

Mr. Nguyen incorrectly asserts that Verizon's statement that Apple iPhone 5 devices made for use on another carrier's network cannot be used on the Verizon Network is deceptive or misleading. *See Answer* ¶¶ 55, 122, 124. Verizon has not made a misleading or deceptive statement. *See id.* Unlike the iPhone 6, the iPhone 5 and earlier generations of the Apple iPhone sold by other carriers and/or for use on other networks are *not* the same as similar models built to work on the Verizon network. *See id.* Those iPhone 5s and earlier generations of the Apple iPhone made for use on other networks do not support CDMA and have not been certified to

meet the technical requirements for use on the Verizon network. *See id.* Thus, Verizon has not violated the Transparency Rule by stating truthfully and accurately that third-party iPhone 5 devices cannot be used on the Verizon network.

VII. VERIZON HAS NO DUTY TO PROVIDE TO MR. NGUYEN OR THE PUBLIC EXPLANATIONS FOR PROPERLY DENYING NETWORK ACCESS (COUNT SIX)

Mr. Nguyen alleges (¶¶ 231, 232, 234, 236) that Verizon violated 47 C.F.R. §§ 8.3 and 27.16 by: (1) not providing detailed, specific explanations for why certain devices took longer than expected to pass Verizon’s certification test; (2) stating that it does not prohibit device manufacturers from providing FM chips in their devices; and (3) suggesting that it was evaluating and testing the Samsung Pay and Pay with PayPal applications. None of those allegations is correct.

A. The Commission Does Not Require Verizon To Provide Specific Explanations About Devices That Are Not Certified and Applications That Are Not Preloaded on the Devices It Sells

The C Block Rules and the Open Internet Rules do not require Verizon to provide to Mr. Nguyen (or the public) specific explanations for why a device may not yet be certified for use on the Verizon network the same day the device is released to the general public. Under the C Block Rules, Verizon is only required to respond to those who have (1) requested network access for their devices or applications, and (2) had their request rejected, “specifying the basis for denying access and providing an opportunity for the requester to modify its request to satisfy [Verizon’s] concerns.” 47 C.F.R. § 27.16(d). And, under the Open Internet Rules, Verizon is only required to respond to device and application providers seeking network access; “to clearly explain [its] criteria for any restrictions on use of [its] network; and to expeditiously inform [the] device and application providers of any decisions to deny access to the network or of a failure to

approve their particular devices or applications.” Report and Order, *Preserving the Open Internet*, 25 FCC Rcd 17905, ¶ 98 (2010).

Mr. Nguyen has not provided any evidence that at any point, he (or anyone else) sought approval for any device and requested an explanation for a denial and that Verizon refused to respond with a specific explanation. Nor has he provided any evidence that Verizon did not explain its criteria for restrictions on use of its network, or inform device and application providers of any decisions to deny access to the Verizon network or of a failure to approve their devices. Nor has Mr. Nguyen “set[] forth a prima facie case that the C block licensee refused to attach a device or application” requiring Verizon to “demonstrate that it has adopted reasonable network standards and reasonably applied those standards.” 47 C.F.R. § 27.16(f).

Instead, Mr. Nguyen simply states, with no support, that Verizon blocked the Asus Nexus 7 and Nexus 6 devices because of “vague” software or systems issues. He is wrong. As discussed in further detail in paragraph 52 of the Answer, Google initially was unable to provide a means for delivering the necessary software that met Verizon’s technical standards to versions of the Nexus 6 purchased from other sources. After the initial launch of the device, however, Verizon and Google worked together to develop a solution to deliver the necessary software to those devices. *See id.* As a result, customers were able to use those Nexus 6 devices on the Verizon network. *See id.*

Moreover, as discussed in further detail in paragraph 43 of Verizon’s Answer, Google, Asus, and Verizon discovered a systems issue that required Google and Asus to undertake additional work with the Jelly Bean operating system running on the Nexus 7. Because Google was about to launch its new Kit Kat OS, rather than undertake this additional work, Google and Asus *themselves* asked Verizon to suspend its certification process until Google’s new Kit Kat

OS was available on the Nexus 7. *See Answer ¶¶ 43, 126, 231.* After that occurred, Google, Asus, and Verizon collaborated and the device was certified. *See id.*

Again, while Verizon's technical standards are publicly available, Verizon must be careful not to disclose any proprietary or confidential information about a particular device that it discovers in the certification process. *See id.* ¶¶ 151, 152, 231. And contrary to Mr. Nguyen's assertions, Verizon *did*, in fact, provide specific explanations to the requesters in satisfaction of the Commission's Rules. *See, e.g., id.* ¶¶ 43, 126, 231.

B. Verizon Has Not Violated the C Block Rules by Stating That the Certification Process Generally Takes Weeks Instead of Months

Mr. Nguyen concludes that Verizon violated 47 C.F.R. § 27.16's transparency requirements for stating that it generally takes weeks to certify a device through its open development process, when it actually took months before customers could use iPhone 6 and 6 Plus devices purchased from other sources. Mr. Nguyen is incorrect.

“[Verizon] must establish a reasonable process for expeditiously reviewing requests from manufacturers, application developers and consumers to employ devices and applications on their *networks*,” and “[i]f [Verizon] denies such a request, it must offer a specific explanation and an opportunity for amendment of the request to accommodate the provider's concerns.” *Service Rules Order* ¶ 224. As discussed above, Verizon has established such a reasonable process, and it expeditiously reviews certification requests and offers specific explanations for the reasons for any denials of certification and an opportunity for applicants to amend and resubmit their requests. Verizon therefore has complied with the C Block Rules' requirements.

Verizon has never guaranteed (nor could it) that the certification process will take a certain amount of time, as that process depends in large part on when the manufacturer brings the device to Verizon seeking certification, the readiness of the device, and the manufacturer's

prompt attention to any issues that arise in the certification process. *See Answer ¶ 36.* And Verizon’s disclosure of the timeframe that might be expected in terms of the device certification process in its publicly available disclosures is an attempt to provide accurate guidance to interested parties as to what the “typical” timeframe is, which necessarily means that some certification applications make take more or less time than the typical application. *See id.* But the fact that certification of a particular device might take longer than the estimated time for how long device certification typically takes does not amount to a violation of any statute or Commission rule.

Moreover, with respect to the iPhone 6 and iPhone 6 Plus devices Mr. Nguyen complains about, as discussed above (*supra* p. 26), that was an issue associated with the availability of the necessary IMEI numbers, and not a question of certification through the open development process.

C. Verizon Accurately Disclosed That It Does Not Prevent Device Manufacturers from Providing FM Radio Chips in Their Devices

Verizon accurately disclosed that it does not prevent device manufacturers from providing FM radio chips in their devices. *See Answer ¶ 236.* Mr. Nguyen alleges that Verizon has misled and deceived consumers because “Verizon has compelled handset suppliers to disable FM radio chips.” Compl. ¶ 236. Once again, Mr. Nguyen provides no evidence to support his allegation, and Verizon denies that it compels handset suppliers to disable FM radio chips. *See Answer ¶ 236.*

D. Verizon Accurately Disclosed That It Was Testing the Pay with PayPal and Samsung Pay Applications

Verizon accurately disclosed that it was evaluating and testing the Pay with PayPal and Samsung Pay applications. Mr. Nguyen’s assertion that Verizon “was actually ‘evaluating’ how to suppress competition against Verizon-backed Isis Wallet and Android Pay,” Compl. ¶ 236, is

incorrect. Verizon denies this unsubstantiated claim, and Mr. Nguyen provides no evidence in support of his theory. In fact, at the time it made the disclosure Mr. Nguyen identifies¹² in his Complaint, Verizon *was* evaluating and testing the Pay with PayPal. *See* Answer ¶ 236.

VIII. THE COMMISSION SHOULD NOT GRANT MR. NGUYEN’S REQUESTS TO AMEND ITS RULES AND/OR CHANGE VERIZON’S OBLIGATIONS UNDER THE LAW

Mr. Nguyen makes a number of requests for prospective relief, all of which are specifically addressed, paragraph by paragraph, in the Answer. However, a number of Mr. Nguyen’s requests ask the Commission to amend its rules or prior decisions. Those requests are procedurally improper in this proceeding and otherwise without merit. As explained in further detail above (*supra* pp. 4-5), the Commission cannot amend its rules or prior decisions without first engaging in the notice-and-comment process.

A. The Commission Should Not Amend Its Rules To Allow Certification of Devices Without Involvement of the Carrier

Mr. Nguyen asks the Commission (¶ 252) to allow edge providers to certify their devices and applications without the carrier’s participation. His request must be denied.

Both the C Block and Open Internet Rules explicitly permit Verizon to engage in “reasonable network management,” 47 C.F.R. §§ 8.5, 8.11, to “ensur[e] network security and integrity,” *Open Internet Order* ¶ 220, and to “restrict . . . devices and applications . . . on [its] C Block network . . . [if] such use would not be compliant with published technical standards or reasonably necessary for the management or protection of [its] network.” 47 C.F.R. § 27.16(b).

¹² One of Mr. Nguyen’s cited “disclosures” for Samsung Pay is from a post on Reddit, a third-party website, which purports to contain an excerpt of a conversation with an “executive” at Verizon but has no date information. Compl. ¶ 99. Another cited “disclosure” for Samsung Pay is a tweet from Verizon’s Twitter account on September 18, 2015. *Id.* ¶ 100. The only cited “disclosure” for Pay with PayPal is an article from a third-party website dated April 11, 2014, and not from Verizon. *Id.* ¶ 89.

And the Commission “emphasize[d] that [it is] not requiring wireless service providers to allow the unrestricted use of *any* devices or applications on their networks. . . . Wireless service providers may continue to use their own certification standards and processes to approve use of devices and applications on their networks so long as those standards are confined to reasonable network management.” *Service Rules Order* ¶ 223. Prohibiting wireless providers from being involved in the process of deciding what devices can safely be used on their own wireless networks conflicts with the Commission’s regulations. Moreover, such an approach would likely endanger Verizon’s network security and infrastructure.

B. The Commission Should Not Prohibit Verizon from Charging Tethering Service Fees for Customers on Unlimited Data Plans

Mr. Nguyen asks the Commission (¶ 254) to prohibit Verizon from disabling tethering “features” and “charging” customers on unlimited data plans tethering service fees. His request must be denied for three reasons:

First, the Commission has recognized that Verizon may continue to charge for access to its tethering service. *See 2012 Consent Decree* ¶ 14 (“Verizon Wireless . . . allow[s] customers on usage-based plans to tether their devices without paying an additional fee, while customers on unlimited usage plans must continue to pay an additional fee to tether their devices.”).

Second, nothing in the Commission’s Rules prohibit Verizon from charging for access to tethering services because the data usage of a full-fledged computer over a wireless network is different from using a smartphone.

Third, the marketplace for wireless service is so competitive and available to all consumers that consumers can simply (1) choose to use one of Verizon’s newer plans that do not charge for access to tethering services, or (2) choose to use a different wireless service if they

wish to do so. And, in any event, Verizon does not charge customers on its most current, usage-based plans for tethering services.

C. The Commission Should Not Force Verizon To Preload on Devices That It Sells Applications That It Does Not Wish to, Nor Prohibit Verizon from Preloading Its Own Applications on the Devices That It Sells

Mr. Nguyen asks the Commission (¶ 254) to: (1) force Verizon to preload on devices that it sells any application that a device manufacturer requests to preload; and (2) prohibit Verizon from preloading its own applications on the devices that it sells. His request should be denied for three reasons:

First, as discussed in detail above (*supra* p. 22), none of the statutes or regulations that Mr. Nguyen cites in his complaint prohibit Verizon from selling devices preloaded with the applications of its choice, nor force Verizon to preload on the devices it sells any application that the device manufacturer requests to be preloaded. In fact, the Commission has explicitly stated that “nothing . . . obligates Verizon Wireless to take affirmative steps, such as including any particular Third Party Application in any Application Store that Verizon Wireless itself operates, to make any particular Application available to its customers on the C-Block Network or to design the devices it offers customers to work with or accommodate any particular Application.” *2012 Consent Decree* ¶ 13(c).

Second, Mr. Nguyen has provided no explanation for (nor any evidence in support of) his theory that consumers would be better off if device manufacturers rather than a carrier were to pick what was preloaded on devices. Nor has he explained how his system would be any more compliant with the Commission’s rules than Verizon’s current system.

Third, Mr. Nguyen’s proposal is inconsistent with standard industry practices. Verizon’s retail devices are being sold as branded Verizon devices; as in other industries, mobile service

providers like Verizon have the discretion to market the products they decide will best reflect their brand and will best attract customers. And device manufacturers have the opportunity to bring devices with preloaded applications through Verizon’s Open Development program if the manufacturers believe that they can offer better alternatives to those offered by Verizon.

D. The Commission Should Not Require Verizon To Offer SIM Cards for Devices That Have Not Been Certified for Safe Use on Its Network

Mr. Nguyen asks the Commission (¶ 263) to force Verizon to offer SIM cards to customers without first checking if the device in question has been certified for safe use on its network. His request must be denied.

Both the C Block and Open Internet Rules explicitly permit Verizon to engage in “reasonable network management,” 47 C.F.R. §§ 8.5, 8.11, to “ensur[e] network security and integrity,” *Open Internet Order* ¶ 220, and to “restrict . . . devices and applications . . . on [its] C Block network . . . [if] such use would not be compliant with published technical standards or reasonably necessary for the management or protection of [its] network,” 47 C.F.R. § 27.16(b). The rules clearly permit Verizon to prohibit access to its network by devices that have not passed Verizon’s certification process. It follows that Verizon does not have to provide SIM cards to customers who intend to use the network-access SIM cards with uncertified devices.

CONCLUSION

Verizon respectfully requests that the Commission deny Mr. Nguyen the relief sought in the Complaint against Verizon.

Respectfully submitted,

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